No. 03-596

In the Supreme Court of the United States

BRIAN GOODINE, A/K/A DWAYNE GOODINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether drug quantity is an element of the offenses of possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841, and conspiring to possess a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 846.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 326 F.3d 26.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2003. A petition for rehearing was denied on May 19, 2003 (Pet. App. 22a-23a). On August 8, 2003, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including September 17, 2003. On September 8, 2003, Justice Souter further extended that time to and including October 16, 2003, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Maine, petitioner was convicted of conspiring to possess cocaine base with the intent to distribute it, in violation of 21 U.S.C. 846, and possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 240 months of imprisonment on each count, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1a-15a.

1. From June 2000 through March 2001, petitioner dealt in cocaine base with two drug organizations in Maine. In April 2001, a federal grand jury in the District of Maine returned a multi-count indictment against petitioner and two co-defendants. Count 1 charged petitioner with conspiring with his co-defendants and others to distribute, and to possess with the intent to distribute, "50 or more grams of cocaine base," in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846. Indictment 1-2. Count 10 charged petitioner with possessing "50 or more grams of cocaine" with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A). Indictment 5. Before trial, the government filed an information pursuant to 21 U.S.C. 851 asserting that petitioner had a prior felony drug conviction.

The jury found petitioner guilty on Counts 1 and 10. The jury specifically found that the quantity of cocaine base involved in those offenses was "5 or more grams," but not "50 or more grams." Pet. App. 3a.

2. Petitioner was subject to sentencing on each count under the graduated penalties set forth in 21 U.S.C. 841(b). In the case of a defendant who, like

petitioner, has a prior felony drug conviction, Section 841(b)(1)(A)(iii) prescribes a maximum term of life imprisonment and a mandatory minimum term of 20 years of imprisonment if the offense involves "50 grams or more" of cocaine base. Section 841(b)(1)(B)(iii) prescribes a maximum term of life imprisonment and a mandatory minimum term of ten years of imprisonment for a recidivist defendant whose offense involves "5 grams or more," but less than 50 grams, of cocaine base.

The Probation Office recommended that petitioner be held accountable for 309.2 grams of cocaine base. Presentence Report (PSR) ¶ 23. That quantity subjected petitioner to a sentencing range of 168 months to 210 months of imprisonment under the Sentencing Guidelines. *Id.* ¶ 47. The Probation Office noted, however, that the district court could impose a 20-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A), if the court found that petitioner's offenses involved 50 grams or more of cocaine base. PSR ¶ 46 (citing *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986)).

Petitioner objected to the Probation Office's calculation of drug quantity and to the imposition of a 20-year mandatory minimum sentence. Petitioner argued that the imposition of that sentence would violate the rule articulated in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Petitioner contended that the *Apprendi* rule should apply to the imposition of a sentence that would exceed the otherwise applicable Guidelines range based on a fact found by the court under a preponderance standard. Def. Sent. Mem. 2-5 (filed July 23, 2002).

Alternatively, petitioner argued that drug quantity is an element of his offenses, so that the court could not give effect to any such finding for purposes of sentenc ing. See *id.* at 6-9.

At sentencing, the district court found that petitioner was responsible for 309.2 grams of cocaine base. Relying on a "plain reading" of Section 841 as well as *Harris* v. *United States*, 536 U.S. 545 (2002), the court explained that the jury's special verdict on drug quantity determines only the statutory maximum sentence, not the minimum sentence. Sent. Tr. 17. Having found petitioner responsible for more than 50 grams of cocaine base, the court imposed concurrent 20-year mandatory minimum sentences under 21 U.S.C. 841(b)(1)(A) on each count. Sent. Tr. 18.

3. The court of appeals affirmed. The court held that the imposition of a 20-year mandatory minimum sentence did not violate the *Apprendi* rule, because that sentence did not exceed the statutory maximum sentence authorized by the jury's verdict under 21 U.S.C. 841(b)(1)(B)(iii). See Pet. App. 13a-15a.[1]

As particularly relevant here, the court of appeals concluded, as a matter of statutory construction, that drug quantity is "not an element" of a drug offense under Section 841. Pet. App. 2a, 12a. The court observed that a "straightforward reading" of the statutory text indicates that Section 841(a) was designed to "identif[y] a crime," whereas Section 841(b) was

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[1] The court of appeals identified the statutory maximum sentence under 21 U.S.C. 841(b)(1)(B) as 40 years of imprisonment. In fact, because of petitioner's prior felony drug conviction, the statutory maximum sentence under that provision was life imprisonment. The difference between a 40-year maximum and a life maximum does not affect the analysis.

designed to "outline[] different penalties for that crime." *Id.* at 10a-11a. The court also read the Conference Report, which described the "sentencing procedures" under Section 841 as giving "maximum flexibility to judges," as indicating that Section 841(b) was intended to provide sentencing factors. *Id.* at 11a (quoting H.R. Conf. Rep. No. 1444, 91st Cong., 2d Sess. (1970)). Aside from the text and history of Section 841, the court reasoned that "drug quantity is a classic sentencing factor"—a fact that "goes to how the offense is conducted, rather than the result of the crime." *Id.* at 11a-12a. Finally, the court suggested that a construction of Section 841 that classified drug quantity as an offense element would "cause[] difficulty we think Congress did not intend" by effectively creating "as many as 350 different offenses." *Id.* at 12a (citing *United States* v. *Promise*, 255 F.3d 150, 175 (4th Cir. 2001) (Luttig, J., concurring), cert. denied, 535 U.S. 1098 (2002)).[2]

ARGUMENT

Petitioner contends that the court of appeals erred in holding, as a matter of statutory construction, that drug quantity is not an element of an offense under 21 U.S.C. 841. Petitioner also asserts that the court of appeals' holding deepens a circuit conflict on that question. See Pet. 4-13. The court of appeals' decision is correct. There is no clear circuit conflict on the question presented by the petition. And the question does not

[2] The court of appeals stated that, because Section 846 "adopts the sentencing scheme of [Section 841]," it was unnecessary separately to address the construction of Section 846. Pet. App. 3a n.2. For that reason, and in the interest of simplicity, this brief adheres to the court of appeals' approach in not separately referring to Section 846.

appear to be of sufficient practical importance to warrant this Court's review at this time.[3]

1. Within broad constitutional limits, "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Accordingly, whether a particular fact specified in a federal criminal statute is an offense element or a sentencing factor (*i.e.*, one that affects the sentence within the legislatively prescribed range) is preeminently a question of congressional intent. See, *e.g.*, *Castillo* v. *United States*, 530 U.S. 120, 124 (2000); *Jones* v. *United States*, 526 U.S. 227, 232-239 (1999); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998). The resolution of such questions, as with all questions of statutory interpretation, turns on the "language, structure, subject matter, context, and history" of the statute. *Castillo*, 530 U.S. at 124; *Almendarez-Torres*, 523 U.S. at 228. Applying those principles to Section 841, the court of appeals correctly reaffirmed its prior decisions holding that drug quantity is not an element of the crime proscribed by Section 841(a).

a. The text, structure, and history of Section 841 reflect Congress's intent to create a single offense with graduated penalties based on, among other things, the type and quantity of drugs at issue.

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[3] Petitioner does not raise any constitutional challenge to his sentence, including the claim raised below that, for purposes of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the top end of the Guidelines range should be treated as the statutory maximum sentence. Cf. *Blakely* v. *Washington*, cert. granted, 124 S. Ct. 429 (2003).

First, Section 841(a) states, in relevant part, that "it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." Section 841(a) thus describes the prohibited conduct and the accompanying state of mind required for a violation, without reference to drug type or quantity. So long as the indictment charges and the jury finds that a defendant knowingly or intentionally engaged in one of the specified prohibited acts involving any detectable amount of "a controlled substance," the offense defined in Section 841(a) is complete.

The specific quantity involved in such an offense becomes relevant only in applying Section 841(b). That subsection states, with certain exceptions, that "any person who *violates subsection (a)* of this section shall be *sentenced*" according to rules that specify particular sentences or sentencing ranges for particular types and quantities of drugs. 21 U.S.C. 841(b)(1)-(4) (emphases added). The statutory text thus distinguishes the elements required for conviction (in Section 841(a)) from the factors relevant to sentencing (in Section 841(b)).

Second, the statutory history confirms that Congress did not intend the facts identified in Section 841(b), such as drug quantity, to be offense elements. Sections 841(a) and (b) were originally enacted as Sections 401(a) and (b) of the Controlled Substances Act of 1970, Pub. L. No. 91-513, Title II, §§ 401-410, 84 Stat. 1260-1269. In that Act, those provisions appeared under the heading "Part D—Offenses and Penalties," and the subheading "Prohibited Acts A—Penalties." To the extent that the statute's language and structure leave any doubt about its meaning, those headings provide further indication that Congress was defining the

"offense" in subsection (a) and the "penalties" in subsection (b). Cf., *e.g.*, *Almendarez-Torres*, 523 U.S. at 234 (recognizing that statutory section headings may be considered in clarifying Congress's intent).

Such a reading accords with the House Report accompanying the Controlled Substances Act of 1970. The Report describes Section 401(a) as "mak[ing] it unlawful" knowingly or intentionally to engage in certain prohibited acts involving drugs, and describes Section 401(b) as "establish[ing] *the following penalties* for anyone who violates [S]ection 401(a)." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 46 (1970) (emphasis added). The Report's explanation reinforces the conclusion that Congress intended to create a single offense-defining provision (in Section 841(a)) and a separate penalty provision (in Section 841(b)).[4]

b. Before *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), all 12 regional courts of appeals, applying variations of the foregoing analysis, concluded that Congress

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[4] Petitioner erroneously contends that the Department of Justice interpreted drug quantity to be an offense element in a publication issued contemporaneously with the enactment of Section 841 in its current version. Pet. 10-11; see U.S. Dep't of Justice, *Handbook on the Anti-Drug Abuse Act of 1986* (*Handbook*) (Mar. 1987). The *Handbook*, which was "not intended to have the force of law or of a United States Department of Justice directive," simply "recommend[ed]" that drug type and quantity "be specified in the indictment and proven at trial." *Handbook* at v (citing *United States* v. *Caceres*, 440 U.S. 741 (1979)); *id.* at 20 (citing three lower court decisions construing predecessor statutes). The *Handbook* followed those citations with a "but see" reference to this Court's then-recent decision in *McMillan* v. *United States*, 477 U.S. 79 (1986), thereby at least raising the question whether *McMillan*'s holding that sentencing factors could be proved to the judge by a preponderance standard would have relevance to Section 841. *Handbook* 20-21.

did not intend drug quantity to be an element of an offense under Section 841. See, *e.g.*, *United States* v. *Lindia*, 82 F.3d 1154, 1160 (1st Cir. 1996) ("Drug quantity * * * is not an element of the offense of conviction."); *United States* v. *Campuzano*, 905 F.2d 677, 679 (2d Cir.) ("Section 841(a) of Title 21 prohibits the distribution of *any* amount of cocaine and in no way requires proof of a particular quantity of narcotics as an element of the conspiracy to distribute."), cert. denied, 498 U.S. 947 (1990); *United States* v. *Lewis*, 113 F.3d 487, 490-491 (3d Cir. 1997) ("[S]ection 841(a) is entitled 'Unlawful acts,' suggesting that the section completely sets forth the elements of the offenses it creates."), cert. denied, 523 U.S. 1108 (1998); *United States* v. *Fletcher*, 74 F.3d 49, 53 (4th Cir.) ("[Q]uantity is not a substantive element of the crime."), cert. denied, 519 U.S. 857 (1996); *United States* v. *Morgan*, 835 F.2d 79, 81 (5th Cir. 1987) ("[Q]uantity is not an element of the crimes proscribed by sections 841(a)(1) and 846."); *United States* v. *Todd*, 920 F.2d 399, 407 (6th Cir. 1990) ("[T]he amount of drug determined pursuant to section 841(b) is not an element of the offense stated in section 841(a)."); *United States* v. *Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989) ("Section 841(b) has nothing to do with the substantive elements of the underlying offense."); *United States* v. *Wood*, 834 F.2d 1382, 1388 (8th Cir. 1987) ("[T]he quantity of cocaine is not an element of a 'separate offense.'"); *United States* v. *Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991) ("Section 841(a) does not specify drug quantity as an element of the substantive offense of possession with intent to distribute."), cert. denied, 502 U.S. 1100 (1992); *United States* v. *Jenkins*, 866 F.2d 331, 334 (10th Cir. 1989) ("[T]he quantity of the substance in the possession of the defendant * * * is not an element of the

substantive offense upon which the charge is based."); *United States* v. *Van Hemelryck*, 945 F.2d 1493, 1503 (11th Cir. 1991) ("[Q]uantity is not an element of 21 U.S.C. 841(a)(1) because quantity is not included as an element in the definition of the offense under that subsection."); *United States* v. *Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992) ("[T]he quantity of drug possessed is not a constituent element of the offense of possession with intent to distribute under 21 U.S.C. 841(a)."). Relying on the statutory text and structure, the legislative history, and other interpretive clues, those courts concluded that Congress intended for drug quantity to be a sentencing factor found by the court by a preponderance of the evidence.[5]

2. In *Apprendi*, 530 U.S. at 490, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court subsequently elaborated that, "[i]n federal prosecutions, such facts must also be charged in the indictment." *United States* v. *Cotton*, 535 U.S. 625, 627 (2002).

The Court's decision in *Apprendi* concerns the requirements of the Constitution, not the interpretation of a statute. As the Eleventh Circuit has explained, "*Apprendi* did not announce any new principles of statutory construction," and, consequently, "does not

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[5] Several of those courts relied, in part, on the fact that, in the United States Code, Section 841(a) is titled "[u]nlawful acts" while Section 841(b) is titled "[p]enalties." As petitioner notes (Pet. 10), those subheadings were not enacted by Congress. The statutory text, structure, and history nevertheless support the conclusion that Section 841 creates separate offense and penalty provisions. See pp. 6-8, *supra*.

change [pre-*Apprendi*] precedent interpreting Section 841." *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (11th Cir. 2001) (en banc), cert. denied, 535 U.S. 942 (2002). Instead, *Apprendi* imposes a "constitutional restraint," *ibid.*, that is "external to" the particular statutory scheme under which a prosecution occurs. *United States* v. *Brough*, 243 F.3d 1078, 1079 (7th Cir.) (explaining that *Apprendi*'s "constitutional requirements are external to Section 841"), cert. denied, 534 U.S. 889 (2001).

Apprendi thus does not hold that, in order for a fact to be used to increase the statutory maximum sentence, the fact must have been intended by the legislature to be an element of the offense. To the contrary, the Court emphasized in *Apprendi* that it makes no difference how the legislature structures a statute or what the legislature calls a fact that increases the statutory maximum sentence, because "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 530 U.S. at 494; see *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."). The Court explained that such facts, whether or not intended by the legislature to be elements, are the "functional equivalent" of elements when they are used to enhance a sentence, and thus must be subject to the same constitutional requirements when so used. *Apprendi*, 530 U.S. at 494 n.19; see *Harris* v. *United States*, 536 U.S. 545, 562 (2002) (plurality opinion) (explaining that the fact at issue in *Apprendi* "functioned more like a 'traditional element'" than a sentencing factor). But

that does not mean that the legislature itself must be deemed to have intended the fact to be an element; it simply means that the Constitution requires that the fact be treated as if the legislature so intended.

3. Petitioner asserts that, in the wake of *Apprendi*, the courts of appeals have disagreed about whether Congress intended for drug quantity to be an offense element under Section 841. Pet. 4-10. Petitioner states that one court of appeals has held that Section 841 "makes drug quantity an element," others have held that "Section 841(b) sets forth sentencing factors," and still others have "adopted a hybrid statutory interpretation" under which drug quantity is an "element" when it affects the statutory maximum penalty. Pet. 6, 9. The cases on which petitioner relies, understood in context, do not support his suggestion of a circuit conflict on whether Congress meant for drug quantity to be an element of a Section 841 offense.

a. In light of *Apprendi*'s constitutional holding, the courts of appeals have consistently recognized that, in order to support a sentence in excess of the otherwise applicable statutory maximum under Section 841(b), the threshold drug quantities specified in that subsection must be treated *as if* they are offense elements. That is, in order for an enhanced sentence to be imposed, the threshold drug quantity must be alleged in the indictment and submitted to the jury for determination beyond a reasonable doubt. That requirement exists *not* because Congress made drug quantity an element of a federal drug offense, but because the Constitution requires such protections whether drug quantity is an element or not. See, *e.g.*, *United States* v. *Jackson*, 327 F.3d 273, 285 (4th Cir.) ("*Apprendi* and its progeny have identified a circumstance in which a fact that the legislature characterized as a sentencing factor

must, as a matter of constitutional imperative, be treated as an element—*i.e.*, when that fact increases the potential punishment beyond the statutory maximum."), cert. denied, 124 S. Ct. 566 (2003); *United States* v. *Minore*, 292 F.3d 1109, 1116 (9th Cir. 2002) (stating that, when an enhanced sentence is sought, "drug quantity—even though usually labeled a sentencing factor—is the 'functional equivalent' of an element"), cert. denied, 537 U.S. 1146 (2003); *United States* v. *Barbosa*, 271 F.3d 438, 457 (3d Cir. 2001) ("Under *Apprendi*, drug identity must be treated as an element only when it results in a sentence beyond the relevant statutory maximum."), cert. denied, 537 U.S. 1049 (2002); *United States* v. *Mietus*, 237 F.3d 866, 875 (7th Cir. 2001) (stating that, under *Apprendi*, facts that trigger an increased statutory maximum sentence "must be treated as elements of the offense").

b. No court of appeals has purported to overrule its pre-*Apprendi* holding that Congress did not make drug quantity an element of a Section 841 offense. To the contrary, those courts of appeals that have revisited the statutory construction issue since *Apprendi* have re-affirmed their earlier conclusions that Congress did not intend for drug quantity to be an offense element. See *Sanchez*, 269 F.3d at 1268 (stating that "*Apprendi* * * * does not change our precedent interpreting Section 841" to create sentencing factors); *United States* v. *Smith*, 308 F.3d 726, 740-741 (7th Cir. 2002); Pet. App. 2a, 9a-12a; see also *United States* v. *Toliver*, 351 F.3d 423, 430 (9th Cir. 2003) (discussed at pp. 16-17, *infra*).[6]

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[6] Petitioner asserts that the Third and Fourth Circuits have "avoided resolving the statutory construction question." Pet. 10 (citing *United States* v. *Vazquez*, 271 F.3d 93 (3d Cir. 2001) (en

Petitioner contends that the D.C. Circuit in *United States* v. *Graham*, 317 F.3d 262 (2003), "definitively held that Section 841 makes drug quantity an element" for all purposes. Pet. 6. But there is nothing at all "definitive" in *Graham* on the question of statutory construction presented here. In that case, the court of appeals held that the district court could not sentence the defendant under Section 841(b)(1)(A) in the absence of a jury finding that his drug conspiracy offense involved the requisite threshold quantity of cocaine base. Observing that post-*Apprendi* circuit precedent had

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banc), cert. denied, 536 U.S. 963 (2002), and *United States* v. *Promise*, 255 F.3d 150 (4th Cir. 2001) (en banc), cert. denied, 535 U.S. 1098 (2002)). Petitioner's choice of the term "avoid[ance]" is questionable. In *Vazquez*, having held that *Apprendi* requires drug quantity to be treated as an offense element when an enhanced sentence is sought under Section 841(b), the Third Circuit had no occasion to revisit its pre-*Apprendi* decisions holding that drug quantity is a sentencing factor. See *Vazquez*, 271 F.3d at 99; *id.* at 108 (Becker, C.J., concurring) (explaining that the majority's conclusions concerning *Apprendi* "implicitly signal[] that it is satisfied with our prior statutory construction of Section 841 [as a sentencing factor] and will continue to apply it in cases where no constitutional—*i.e.*, *Apprendi*—difficulty arises"). In *Promise*, a majority of the Fourth Circuit appeared to accept the continued validity of its pre-*Apprendi* construction of Section 841(b) as not creating offense elements. See *Promise*, 255 F.3d at 156-157 (plurality opinion of Wilkins, J.) ("[W]e have previously held, as three of my colleagues reiterate now, that Congress intended [for drug quantities] to be sentencing factors."); *id.* at 169 (Luttig, J., concurring) ("I would hold without any hesitation whatsoever that *Congress'* manifest intent is that the sole offenses established in section 841 are those set forth in sections 841(a)(1) and (a)(2)."); *id.* at 167 (Niemeyer, J., concurring, joined by Gregory, J.) ("I would conclude that the only rational reading of 21 U.S.C. § 841 is that elements of the offense are stated in § 841(a) and the sentencing factors are provided in § 841(b).").

"implicitly treated § 841 as a tripartite statute" (*i.e.*, as one "establishing three separate offenses, with different maximum sentences based on drug quantity"), the court of appeals concluded that, when the jury does not make a drug quantity finding, the term of imprisonment as well as the term of supervised release must be imposed under Section 841(b)(1)(C). 317 F.3d at 274-275. Because it was unclear whether the defendant's five-year term of supervised release in *Graham* was imposed under Section 841(b)(1)(A) or Section 841(b)(1)(C), the court of appeals remanded for resentencing. *Id.* at 275.

Seizing on *Graham*'s "tripartite statute" language, petitioner asserts that the D.C. Circuit has construed Section 841 as making drug quantity an offense element. Pet. 6-7. At best for petitioner, however, *Graham* is equivocal on that point. *Graham* did not present a pure question of statutory construction. And neither *Graham* nor the cases it relied on addressed Congress's intent in enacting the statute or otherwise applied tools of statutory construction to determine whether Section 841(b) creates offense elements. Cf., *e.g.*, *United States* v. *Williams*, 194 F.3d 100, 102-107 (D.C. Cir. 1999) (applying traditional tools of statutory construction, before *Apprendi*, to reaffirm circuit precedent holding that drug quantity is not an offense element under Section 841), cert. denied, 531 U.S. 1178 (2001).

Although the D.C. Circuit has referred to drug quantity after *Apprendi* as an "element," that characterization is properly understood to mean not that Congress intended it to be an element, but that the Constitution requires that it be treated as if it were an element when an enhanced sentence is sought. The cases that *Graham* cites are consistent with that under-

standing. See *United States* v. *Webb*, 255 F.3d 890, 896 (D.C. Cir. 2001) (observing that after *Apprendi*, "if Section 841 were interpreted as a tripartite statute * * * then the drug quantity thresholds *effectively are elements* that must be decided by a jury") (emphasis added); *United States* v. *Fields*, 242 F.3d 393, 396 (D.C. Cir. 2001) ("In light of *Apprendi*, it is now clear that, in drug cases under 21 U.S.C. §§ 841 and 846, before a defendant can be sentenced to any of the progressively higher statutory maximums that are based on progressively higher quantities of drugs specified in subsections 841(b)(1)(A) or (B), the Government must state the drug type and quantity in the indictment, submit the required evidence to the jury, and prove the relevant drug quantity beyond a reasonable doubt.").

Although petitioner initially contended that the Ninth Circuit, as well as the D.C. Circuit, "holds that drug quantity is an element of the offense under Section 841" (Pet. 7), petitioner no longer presses that contention. See Letter of Thomas C. Goldstein to Hon. William K. Suter (Jan. 6, 2004). As petitioner acknowledges, "the Ninth Circuit's intervening decision in *United States* v. *Toliver* is consistent with the decision below" in this case. *Ibid.* (internal citation omitted). As the court of appeals explained in *Toliver*:

> [D]rug quantity and type need only be treated as "functional equivalent[s]" of formal elements of an offense when a particular drug type or quantity finding would expose a defendant to an increased maximum statutory sentence, as they do not constitute formal elements of separate and distinct offenses under section 841(b)(1). When drug quantity or type would not have such an effect, they need not be accorded this special treatment. Thus,

> while we may label a fact as the "functional equivalent of an element" for purposes of *Apprendi*, that does not transform the fact into an offense "element" for purposes of [*In re*] *Winship*[, 397 U.S. 358 (1970)].

351 F.3d at 430. The Ninth Circuit reiterated the same point in *United States* v. *Thomas*, No. 02-10409, 2004 WL 112644, at *4 (Jan. 26, 2004) ("[D]rug type and quantity 'do not constitute formal elements of separate and distinct offenses under section 841(b)(1).'") (quoting *Toliver*, 351 F.3d at 430). In view of the categorical rejection in *Toliver* and *Thomas* of the suggestion that drug quantity and type are elements of a Section 841 offense, there is no merit to petitioner's new assertion that "the precedent of the Ninth Circuit is presently simply confused" on the question presented. Letter at 1.

c. Petitioner also contends that, while several other courts of appeals have "h[e]ld that Section 841(b) sets forth elements of the offense," they have done so only when a sentence exceeds the statutory maximum. See Pet. 9 (citing *United States* v. *Darwich*, 337 F.3d 645, 655 (6th Cir. 2003), *United States* v. *Mendoza- Gonzalez*, 318 F.3d 663, 673 (5th Cir.), cert. denied, 123 S. Ct. 2114 (2003), and *United States* v. *Thomas*, 274 F.3d 655, 663-664 (2d Cir. 2001) (en banc)). Although those courts have occasionally referred to drug quantity as an "element" of a Section 841 offense, see, *e.g.*, *Thomas*, 274 F.3d at 663-664, that description cannot plausibly be understood to encompass a sub silentio conclusion that drug quantity is a legislatively mandated "element." The decisions that petitioner cites do not analyze whether Congress intended drug quantity to be an offense element. Nor do they overrule or repudiate

pre-*Apprendi* precedent holding that Congress did *not* intend to create elements.

Rather, the courts' use of the term "element" is most naturally understood as a shorthand way of expressing the concept that, when an enhanced sentence is sought, the Constitution requires that drug quantity be treated *as if* it were an element. Indeed, the Second Circuit has cautioned against reading too much into the language in *Thomas* upon which petitioner relies: "In *Apprendi* and *Thomas*," the court explained, "the term 'element' was used simply as a shorthand for a set of procedural requirements" that must be adhered to when an enhanced sentence is sought. *Coleman* v. *United States*, 329 F.3d 77, 86 (2d Cir. 2003); cf. *Illinois* v. *Lidster*, 124 S. Ct. 885, 889 (2004) ("We must read this * * * general language * * * as we often read general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."). Thus, petitioner's assertion that those cases reflect an anomalous "hybrid *statutory* interpretation" (Pet. 9 (emphasis added)), under which supposedly statutorily mandated elements are only elements some of the time, is untenable. The cases instead embody a rational synthesis of congressional intent (not to treat drug quantity as an element for all purposes) and constitutional command (to treat drug quantity as an element when necessary to support an enhanced sentence).

Accordingly, because no court of appeals has clearly held, either before or after *Apprendi*, that Congress intended for drug quantity to be an offense element, there is no square circuit conflict on that question.

4. It is unclear whether, or to what extent, the question presented in the petition has prospective significance. After *Apprendi*, in cases in which the government intends to seek an increase in the otherwise applicable statutory maximum sentence, federal prosecutors routinely assure that the threshold drug quantity needed for an enhanced sentence is charged in the indictment and submitted to the jury for determination beyond a reasonable doubt. Consequently, the question whether Congress itself intended for drug quantity to be an offense element is ordinarily of little, if any, prospective importance in cases like this one, because drug quantity is being treated as if Congress *had* intended it to be an element. The question presented would recur in cases in which the jury finds that a threshold quantity of drugs was not proved beyond a reasonable doubt (thereby precluding an increase in the statutory maximum sentence), but the court then finds that the threshold quantity was proved by a preponderance of the evidence (thereby requiring the court to impose the mandatory minimum sentence associated with that finding). To date, this appears to be the only case to present that precise scenario. This Court's review is not warranted absent any indication that the same scenario will arise with any frequency in the future.[7]

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[7] The distinction between offense elements and sentencing factors may also affect guilty plea practice when a defendant seeks to plead guilty to a violation of Section 841(a) while contesting the drug quantity alleged in the indictment as a basis for imposing an enhanced sentence under Section 841(b). See *Thomas*, 2004 WL 112644, at *6 (holding that, "even where due process requires that a drug quantity allegation be pleaded in an indictment and proved to a jury beyond a reasonable doubt, a defendant can plead guilty to the elements of the offense without admitting the drug quan-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tity," which the defendant could not do if drug quantity were an element). The impact of the distinction under Section 841 between offense elements and sentencing factors in the guilty plea context is unclear, however, since it has been addressed to date rarely, if at all, apart from the recent decision in *Thomas*.